FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 4 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. [redacted] 96

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION.
Respondent.

PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

PAUL VAN OSDOL, JR.,
1212 Fairfax Building,
Kansas City, Missouri,
Counsel for Petitioner.

CHARLES W. HESS,
Of Counsel.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Grounds for Rehearing 1

Statement of the Case 2

I. Question Presented Is One of Public Importance 3

II. The "State's Taxing Theory" Referred to in the Above Quoted Statement Is a Complete Disregard of Established Law 6

Conclusion 8

Certificate 8

Appendix A1

Table of Cases

J. D. Adams Mfg. Co. v. *Storen*, 304 U.S. 307 (1938) ... 3, 6

Henneford v. *Silas Mason Co.*, 300 U.S. 577 (1937) ... 3

Sou. Pac. Co. v. *Gallagher*, 306 U.S. 167 (1939) ... 3

Miscellaneous

Kansas City Star, Tuesday, October 13, 1959 5

Mechanix Illustrated, September, 1959, Issue—Frank Tinsley 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

Comes Now, Custom Built Homes Co., Inc., and respectfully prays for a rehearing and reconsideration of its petition for certiorari heretofore filed in this cause. This petition is filed under Rule 58, Paragraph 2.

GROUNDS FOR REHEARING.

1. Recent publications and public statements occurring since the filing of the Petition for Certiorari indicate

that the Petition for Certiorari presents a matter of extreme public interest and importance.

2. The decision of the Kansas Supreme Court that interstate shipments may be taxed by a state is an original break-through of a line of authorities to the contrary that has been the law of this Court for many years; and said decision permits an Unconstitutional burden upon interstate shipments.

STATEMENT OF THE CASE.

The petition for certiorari in this matter was filed with this court on June 8, 1959. The order denying said petition for certiorari was entered by this court on October 12, 1959.

The question presented by the petition for certiorari was whether or not it was proper for the State of Kansas to tax an interstate shipment before the interstate journey had ceased, under the Kansas Compensating Use Tax, which is a tax upon personalty, and imposed upon the right to use, store or consume said personalty. The particular facts in this case involved a shipment of pre-fabricated wall, ceiling and roof sections of houses, the shipment of which originated in Minnesota and ended upon the foundation as part of the realty in the State of Kansas. Under the facts set forth in the petition, the seller, a Minnesota concern, shipped said sections interstate by means of its own trucks and delivered the sections by means of a crane attached to its truck, and the sections did not come to rest until they were attached to and a part of the realty. After they were nailed down as part of the unloading the hooks from the manufacturer's crane were removed from the sections and they stood permanently in place.

The result of this Court's denial of the petition of certiorari permits a decision of the Supreme Court of Kansas to the effect that Kansas has a right to tax these sections as personalty while they are still in the interstate journey.

It is, of course, not apparent from the order of this Court denying the petition whether that denial is on the grounds that said decision is not in conflict with the decisions of this Court or whether, even though it is in conflict, there is not a matter of sufficient public interest involved to warrant this Court's taking jurisdiction of the matter. In view of the fact that the decision of the Supreme Court of Kansas for which certiorari is sought, is diametrically opposed to the following Supreme Court cases which were cited in the petition for certiorari and admittedly the law (*J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938); *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937); *Sou. Pac. Co.* v. *Gallagher*, 306 U.S. 167 (1939)) (see argument of the respondent, page 12 of its brief), it must be assumed that this petition was denied for the reason that the matter is not of such public interest as would warrant this court's assuming jurisdiction of the matter.

I.

Question Presented Is One of Public Importance.

The importance to the public of this decision was presented in brief manner at page 7 of the petition for certiorari; but within the time following the filing of the petition and prior to the order denying the petition, a recent publication, in which experts on the subject were quoted, emphasizes and clarifies the importance of this erroneous decision of the Supreme Court of Kansas, and illustrates how it will more seriously affect interstate

transportation in the very near future. We refer to an article appearing in *Mechanix Illustrated*, September, 1959, issue, written by Frank Tinsley. For the convenience of the court, the illustrations appearing in that article and magazine and the important contents of the article are reprinted in the appendix hereto and incorporated in and made a part of this petition for rehearing.

Petitioner is well aware that *Mechanix Illustrated* is not a basic reference, but two things are true of this article: (1) It quotes aeronautical authorities who are recognized as the outstanding authorities in the field; and (2) it predicts a transportation method which is in principle identical to the one at bar, but which makes the fallacy of the Kansas decision so much more readily apparent.

The petitioner, who is very familiar with this field, was not aware of the scope of the effect of this decision as it would affect interstate transportation under the slightly different process of transportation described in the *Mechanix* article, but which is in principle fundamentally the same as that referred to in the petition for certiorari. As stated in the article, the helicopter, which was the principal subject, will be well capable of transporting an entire house (rather than completely prefabricated walls) from its manufacturing point in Minnesota to its resting place in Kansas; and as further pointed out, by carrying loads up to 50 tons, "it is not beyond the bounds of possibility to prefabricate a whole skyscraper floor in an outlying work yard, then to pick up the unit, complete with curtain walls and glazed windows, and airlift it to a midtown building site. The same is true with bridge spans; water, gas and fuel tanks; powerline towers and a host of other construction projects."

When this occurs, the decision of the State of Kansas, and other states who may choose to expand their taxing facilities, will hold that the states can tax these whole houses or these whole skyscraper floors as personalty while still in flight in the same manner that they have been successful in maintaining that Kansas can tax these pre-fabricated walls while in interstate shipment. If this occurs, as it has in Kansas, 50 states will, for the first time, be able to tax interstate shipments, even though the state of manufacture and assembly may have theretofore taxed the process and the work and the utility added to the structure in the state of manufacture.

It was for these reasons that petition for certiorari was sought and your petitioner tried to emphasize to the court the far-reaching effect of this decision. The article which we have incorporated in this petition for rehearing merely points up, in a more obvious way, the fallacy of the decision. As heretofore stated, the principle is exactly the same whether it be a whole house moved across the state line by helicopter, or whether it be a wall of that house moved across the state line by the manufacturer's truck and swung into position by the manufacturer's crane on the truck.

Further evidence of the important public issue involved is a recent public statement by Clarence J. Malone, chief attorney for the respondent. In the *Kansas City Star*, Tuesday, October 13, 1959, he is quoted as follows:

> "Malone said several millions of dollars actually would have been involved had the court held against the state's taxing theory, with other suppliers in heavy industry seeking to take advantage of the transportation plan involved."

II.

The "State's Taxing Theory" Referred to in the Above Quoted Statement Is a Complete Disregard of Established Law.

To summarize that theory, it is as follows:

1. The Kansas decision recognizes that the question of when title passes is immaterial and that the real question is: when does the interstate journey end? (petition for certiorari, page A-19, second paragraph).

2. The fact that the State cannot tax merchandise while in its interstate journey, but can only tax it after that journey has ceased, is well recognized in that the respondent in its brief quotes the identical cases as those relied upon by petitioner in its petition for certiorari (see page 12, brief for respondents in opposition). It is likewise uncontroverted by the Respondent that taxing by a state of an interstate shipment is an Unconstitutional burden thereon. *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (p. 6 Pet. Cert.)

3. The Kansas Tax Commission makes no effort to dispute the cases cited by petitioner to the effect that the interstate journey includes the entire unloading process (see petition for certiorari, pages 9 and 10). Hence, it must be assumed that the pre-fabricated walls in this case are still on their interstate journey until after they are affixed permanently to, and have become a part of, the real estate.

4. Despite these conclusions, the Supreme Court of Kansas had "no hesitancy in declaring that at some moment after the interstate journey of the merchandise in question had come to an end, it occupied the status of tangible personal property * * * etc." (p. A-26, Pet. Cert.)

Of course the above theory of taxation is impossible—the interstate journey and the existence of the walls as a permanent part of the real estate were *overlapping* from a time standpoint. How, then, could a taxable moment exist even though infinitesimal?

This was not the case in the authorities cited in the petition for certiorari that recognized "instant taxable moments"—in each case it was at least possible for that instant to have occurred. Such is not so in this case. (Cases at p. 7, Pet. Cert.)

The Supreme Court of Kansas tried to justify the tax on the theory (page A-26, petition for certiorari) that the merchandise had passed "under the protection of state law and" had become "subject to the taxing and police power of the state". When that event occurred the merchandise was realty, and, conversely, in order for Kansas to tax personalty it, of necessity, had to tax an interstate shipment still under the protection of Federal law—not state law.

CONCLUSION.

The decision of the Supreme Court of Kansas from which certiorari is sought is admittedly contrary to the law as it existed heretofore. We sincerely believe that this court should face this problem at this time and make a decision which will establish a precedent consistent with the law as it has heretofore existed. As we have herein pointed out the fact situation presented in the instant case is not unique, but one which will occur regularly hereafter.

Respectfully submitted,

PAUL VAN OSDOL, JR.,
1212 Fairfax Building,
Kansas City, Missouri,
Counsel for Petitioner.

CERTIFICATE.

The undersigned of counsel for petitioner hereby certifies that the foregoing Petition for Rehearing and Reconsideration of Order Denying Petition for Certiorari is presented in good faith and not for delay, and that this petition is restricted to the grounds stated above.

SKIN-DIVING FOR TREASURE • GIANT CATAMARAN

MECHANIX
ILLUSTRATED
September 1969

WORKHORSES of the Sky

WORKHORSES OF THE SKY

By Frank Tinsley

How would you like to pick up your summer cottage and move it to Florida for the winter? Or, during the dog-days of August, loft it to some cool wilderness lake? Or would you prefer to airlift your comfortable houseboat across the wilds of Canada and, in a matter of hours, set her down on one of the uncrowded inlets of Hudson's Bay? What a way that would be to spend a wonderful vacation!

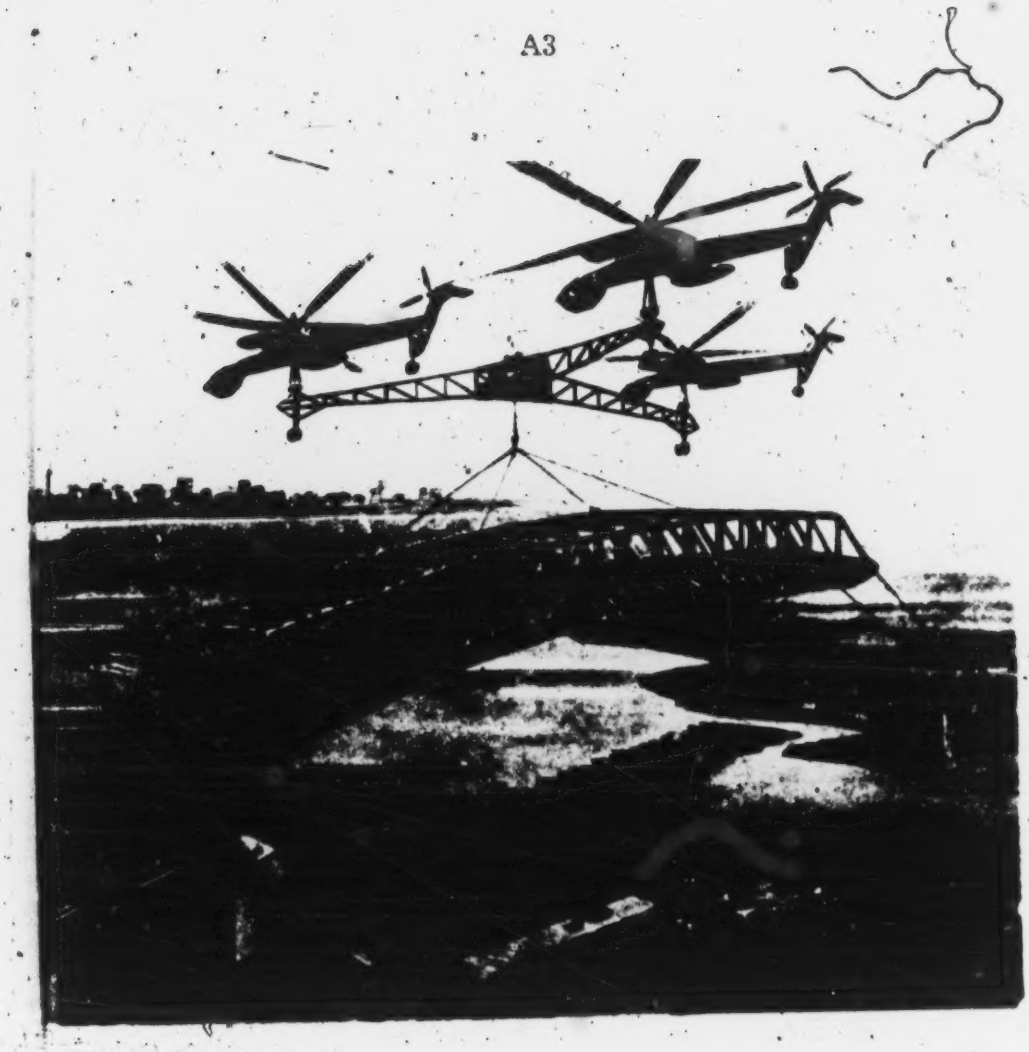
Sound crazy? It might have seemed so a year or two ago but not now. The advent of a practical sky-hook, a power-packed "flying crane" built to lift and carry heavy loads, has revolutionized our ideas about transportation. Long dreamed of by industrialists, construction engineers and the military forces, a flying towboat is now being tested at the Army's helicopter center at Fort Bragg, N. C. It is only an experimental model, put together with off-the-shelf parts of other copters. But even this preliminary model can hoist a six-ton load right out of a basket and fly it anywhere in the country.

Like the first practical helicopter, the 1939 VS-300, the new S-60 flying crane (see preceding page and the front cover) is a product of Sikorsky engineering genius. It combines the fivebladed rotor and twin reciprocating powerplants of the S-56 Marine troop carrier, with a stripped down, girderlike body. At the front end of this lifting beam is an underslung cabin for the crew and at the other, the tail surfaces and trim rotor. Completely surrounded by glass for maximum visibility, the pilot perches in a unique swivelling seat. During the jockeying necessary to latch on to a load, he can face backward to keep an eye on his target. After take-off, he swings around and faces forward for flight. Simple—but new!

This S-60 has been a fast mover. Emerging from the assembly hangars at Stratford, Conn., in April, it headed for an Army helicopter exhibition at Fort Bragg to show what it could do. It airlifted missiles, planted rows of two-ton telephone poles and lowered 4,500-pound floor sections in place on an army pontoon bridge. Currently, it is undergoing a complete program of flight testing.

Although the S-60 provides an immediate, moderate-cost answer to the flying crane problem, Sikorsky engineers are far from satisfied. Far larger and more powerful models are taking shape on their drawing boards, incorporating a wide variety of forms and power-plants. Among them is a twin-boom configuration that eliminates the tail fin and wheel to permit free access from the rear. Cargo and passenger pods can be backed into position and hooked up with ease and accuracy. Various types and combinations of gas turbines are under consideration, including General Electric T-64s and Pratt & Whitney JT-12s. These high-power, lightweight engines, driving outsized six-bladed rotors, promise a tremendous stepup in lifting capacity within the next year or so. Some of the models now in the design stage are expected to carry loads up to 50 tons.

"Such machines," says Lee S. Johnson, Sikorsky general manager, "could revolutionize the transportation business." He sees the military and commercial uses of the aerial crane "liimted only by man's imagination." MI's editors agree and some of these future possibilities are explored and illustrated here. Special consideration has been given to extending their prospective earning power. With this in mind, let's move ahead to 1965 and take a look at a typical day in the life of a flying crane.



[redacted] FILE COPY

Office Supreme Court, U.S.
FILED
NOV 6 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. [redacted] 96

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

SUPPLEMENT TO PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

PAUL VAN OSDOL, JR.,
1212 Fairfax Building,
Kansas City, Missouri,
Counsel for Petitioner.

CHARLES W. HESS,
Of Counsel.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 980.

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

SUPPLEMENT TO PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

The attached article, Appendix B, reached the undersigned's desk this morning, after mailing of Petition for Rehearing, and it is the first compilation published that we have been able to find in regard to the growth of the Pre-Fab Industry.

It has a direct bearing on Ground No. 1 of the Petition for Rehearing and Reconsideration of Order Denying

News

Vol. XIV; No. 11 November, 1959

THE PRE-FAB....

TOMORROW'S HOUSING GIANT

by WILLIAM C. SMITH, President
Housing Credit Corporation

RICHMOND CHAMP—A four bedroom 28' 18" x 40' 8", 1150 sq. ft. standard line home available in four beautiful elevations, carport, garage 2-12 and 5-12 roof

Home prefabrication in our country probably really began that fateful day when our revered forefather, Mr. Pioneer, first realized that his good neighbor did a better job of hewing out logs for his cabin than he himself could do.

As our era of specialization progresses, the single home builder, like Mr. Pioneer, constantly adds to his list material that he can buy cheaper and better than he can make himself. Technological

During World War II the term prefabrication became a term of common parlance. It was not an entirely pleasant word, as the war material shortages, hurry up deadlines and lack of skill or sufficient manpower caused the completion of a number of inferior and poor quality projects.

It is not surprising that many people in contact with the erection and maintenance of these second rate struc-

ance to prefabrication even today certain persons carry this feeling of dislike for prefabrication.

The Home Manufacturers Association, an organization made up of the leading manufacturers of home packages, have worked long and hard in dispelling many of these war gained prejudices. The HMA has been largely instrumental in correcting many of the mistaken ideas about today's prefab

The same process applies to any heavy load. Manufactured goods, household furniture, rush shipments of all sorts, even perishable fruits and vegetables can be packed in weather-proof or insulated cargo containers and flown expeditiously to their destinations. In modern America, house moving has become a familiar phenomena, especially on the West Coast. Jacking up the usual dwelling and rolling it over the road can be a tedious and expensive procedure. Power and phone lines must be by-passed or cut, streams and railroads detoured and motor traffic interrupted. How much easier it will be to lift one's house straight up out of its surrounding neighbors, airlift it to another community and set it gently down on prepared foundations.

In the construction field, the copter sky-hook fills a long felt need. Even with lofty top extensions and elaborate rigging, there is a limit to the practical length of crane booms. There is also a limit to their lifting capacity, which means that steelwork must be erected in bits and pieces. Handling large sub-assemblies is obviously more economical and it is here that the copter crane can do the trick--either singly or in multiple hitches. It is not beyond the bounds of possibility to pre-fabricate a whole skyscraper floor in an outlying work yard, then to pick up the unit, complete with curtain walls and glazed windows, and airlift it to a midtown building site. The same is true with bridge spans; water, gas and fuel tanks; powerline towers and a host of other construction projects.

HOUSE MOVING by air-lift could result in homes made in factories, flown to prepared foundations anywhere.

© FRANK TINSLEY '5